a contract of guarantee as security for bank overdraft facilities, the terms of which are almost a carbon copy of those contained in the guarantee in the present case. Some such terms, one may find, for example in cl 1 which stipulates that:

> In consideration of you ... making or continuing advances or otherwise giving credit or offering banking facilities for as long as the bank may think fit and that the guarantors guarantee payment on demand ... all money ... whether certain or contingent now or hereafter owing ... on any current or other account or in any manner whatsoever ... etc.

By cl 2, it is provided that the guarantee:

> ... shall be a continuing security and shall extend to cover any sum or sums of money which shall for the time being constitute the balance due ...

Clause 4 provides that the guarantee 'shall be in full force and binding as a continuing guarantee'.

By cl 7, the bank may at all times and without notice 'determine, vary or increase any credit' to the customer. The Federal Court in *Heng Cheng Swee's case*[5] handed out two separate judgments, one by the then Lord President Tun Suffian and the other by his Lordship the Chief Justice of Borneo. The court was dealing with a letter of guarantee signed by the appellants as security for overdraft facilities given by Bangkok Bank to a company called The Malayan Timber and Granite Products Ltd. The court was unanimous in its finding which treated the guarantee as a continuing guarantee. For the purpose of disposing of the case before me, I need only recall the words of Tun Suffian in that case at p 271 para G:

> ... The defendant (meaning the appellant) has signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future.

In that case the said company, in the course of business, applied for and obtained overdrafts from the said bank on many occasions. Then the bank asked for guarantees and the defendant/appellant came to the rescue. Similarly in the present case, the first defendant company had been enjoying overdraft facilities granted by the plaintiff bank at least since September 1980 (see statement of account exhibited in encl 7) and the letter of guarantee was signed on 31 July 1981 and by its terms, it must similarly be treated as a continuing guarantee because it guaranteed not only the overdraft existing at the time but also those in the future. I therefore dismissed the appeal with costs.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar*; *Ten Appaduray & Wong.*

Reported by *Ng Sheau Jiuan*

MMC Marketing Sdn Bhd v Syarikat Pengangkutan Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C1449/81
SITI NORMA YAAKOB J
11 JULY 1988

Carriage by Air and Land – Common carriers – Liability for loss or injury

Damages – Loss of goods by carrier – Adjuster's fees for investigations paid by plaintiff – Whether recoverable from defendant

Evidence – Confidential documents – Non-production at trial – Whether adverse inference should be drawn

The defendant carried on the business of carrying goods for hire. In 1978, the plaintiff accepted the defendant's quotations for the transport of the plaintiff's tin ore concentrates purchased from mines in Perak to the smelters in Penang. Since then, the defendant had undertaken the transport of the tin ore concentrates for the plaintiff, although there was no exclusive long term agreement between the parties. Two of the defendant's lorries carrying the plaintiff's tin ore concentrates were hijacked while on the way to Penang. The plaintiff brought a claim against the defendant for the loss occasioned thereby.

An issue which arose was whether the defendant was a common carrier or a private carrier. Another issue was whether the plaintiff had proved its claim for the price of the tin ore concentrates and the 10% premium charged on the net value of the tin ore concentrates by the adjusters engaged by the plaintiff to investigate the loss.

Held, allowing the application: (1) The defendant was a common carrier. By its memorandum of association, they had held themselves out as carrying on the business of general carriers to transport goods for hire or reward, and by virtue of the conditions of the licences they could not refuse to carry any goods which they might be requested to carry. The permits granted by the Mines Department to the mine owners authorizing the transportation of the tin ore concentrates required the carriers to conform to the routes stated in the permits. The fact that the lorry drivers could not choose the routes to take to the smelters emphasized all the more the public nature of the defendant's business and in no way could it be said that it was a private carrier. The fact that the plaintiff was the defendant's main customer did not make the defendant anything less than a common carrier as the defendant had business dealings with other third parties in transporting rubber. The law of agency had no bearing on the case as the defendant was undoubtedly a carrier of goods for hire or reward.

(2) A common carrier is responsible for the safety of the goods entrusted to him in all events except where loss or injury arises solely from an act of God or the fault of the consignor or inherent vice in the goods themselves, eg unruliness in the animals carried. His liability is strict as he is the insurer of the safety of the goods and he is liable if the goods are stolen by persons over whom he has no control.

(3) The defendant's objection to the sum claimed failed as the plaintiff's witness had not been cross-examined as to how the plaintiff had arrived at the figure of $474,740.74. The prices for the tin ore concentrates were fixed by the agreements between the plaintiff and the mine-owners. The agreements were confidential documents and their non-production at the

trial did not tilt the case one way or the other for the very reason that they had nothing to do with the defendant at all. The 10% premium charged by the adjusters and paid by the plaintiff was an item of necessary expenditure incurred, resulting from the hijacking and could properly be claimed from the defendant.

Legislation referred to
Commercial Vehicles Licensing Board Act 1987 s 14(3)
Road Traffic Ordinance 1958 s 100(2)

V Krishnan for the plaintiff.
Ong Chin Beng (*Naidu* with him) for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: The plaintiff's claim in this suit represents the value of 553 bags of tin ore concentrates that were hijacked when they were transported by the defendant's lorries to the smelters in Penang.

At the material time, the defendant carried on the business of transporting and carrying goods for hire and has had business dealings with the plaintiff since 1978 when the plaintiff accepted the defendant's quotations in preference to other quotations tendered by other transport companies to transport the plaintiff's tin ore concentrates from its various mines in Perak to the smelters in Penang (D3 refers). Although there was no exclusive long term agreement signed between them, their arrangement was that as and when the defendant's services were required, the plaintiff would instruct the defendant to collect and transport the tin ore concentrates from the plaintiff's various mines to the smelters in Penang.

For this purpose, a delivery order like AB3 and AB4 would be completed by the defendant identifying the driver who would make the shipment and the driver's personal particulars would be entered on the top part of the form. Under the heading 'particulars of delivery' the mine where the tin ore concentrates were collected would fill in the details of the total number of bags collected, the gross and nett weights of each bag collected, the date of delivery, the lorry used for the delivery and the times the bags were loaded on to the lorry and its departure from the mine.

From AB3, it is clear that on 11 March 1981, 208 bags of tin ore concentrates were loaded on to lorry AL 3300 and it left the premises of Kramat Tin Dredging Bhd at 9.30 am the same day. Likewise from AB4, lorry AM 4545 was loaded with 345 bags of tin ore concentrates and from the permits mentioned, it is clear that the tin ore concentrates were collected from Berjuntai Tin Dredging Bhd and the lorry, laden with its valuable cargo left the mine premises on 12 March 1981 at 9.30 am. It is not disputed that the defendant was not the registered owner of both the lorries but had obtained them from other third parties to transport the plaintiff's tin ore concentrates to the smelters in Penang. However, at 11.15 pm on 11 March 1981, lorry AL 3300 was hijacked when it was on its way to Penang and two days later, the same fate befell lorry AM 4545 when it was hijacked at 2.00 am on 13 March 1981.

Since the plaintiff had already paid the two mining companies concerned for the tin ore concentrates, they now seek to reimburse their loss resulting from the hijackings of the lorries from the defendant directly by claiming the actual sum they had paid for the tin ore plus the incidental charges that resulted from their loss.

Only two issues were raised at the trial, namely, the determination of whether the defendant is a common or private carrier and whether the sum claimed has been proved by evidence.

Carriers have been defined by *Halsbury* as being 'persons who, gratuitously or for reward, carry passengers or goods, otherwise than for their own trade or business. They may be classified as (1) common carriers, (2) private carriers, (3) other classes of carriers with special rights and duties'.

In England the rights and liabilities of a common carrier are determined by the common law for reasons of public policy subject to qualification by statute, whereas the rights and liabilities of a private carrier are usually determined by contract alone. In every case, apart from any statutory exception, it is a question of fact whether or not a person is a common carrier.

To constitute a person a common carrier of goods he must hold himself out, either expressly or by a course of conduct, as willing to carry for reward, the goods of all persons who send him goods to be carried at a price. He must hold himself out as ready to carry for hire as a business and not as a casual occupation for a particular occasion. If he reserves the right to reject goods whom he is asked to carry or if he only carries certain goods for certain customers, he is not a common carrier.

A common carrier is responsible for the safety of the goods entrusted to him in all events except where loss or injury arises solely from an act of God, or the fault of the consignor or inherent vice in the goods themselves, eg unruliness in the animals carried. His liability is strict as he is the insurer of the safety of the goods and he is liable if the goods are stolen by persons over whom he has no control.

Unlike England, there are specific statutes in Malaysia that regulate the liability of the common carrier and these are to be found in the Road Traffic Ordinance 1958, the Rules made thereunder and the Commercial Vehicle Licensing Board Act 1987.

The two lorries that carried the tin ore concentrates had A carrier licences to do so and under s 100 (2) of the Road Traffic Ordinance 1958 and s 14 (3) of the Commercial Vehicles Licensing Board Act 1987, the holder of

such a licence is entitled to use such a vehicle for the carriage of goods for hire or reward for or in connection with his business as a carrier of goods. Clause 3(1) and (2) of the defendant's memorandum of association lists the objects of the company as being the following:

(1) To carry on the business of general carriers in all its branches, to transport and carry goods for hire or reward in Perak and elsewhere in Malaysia and in any other part of the world as the company shall think expedient.

(2) To carry on the business of, public, private or common carrier proprietors by land, sea and air in all their respective branches and the business of railway, shipping, airline and forwarding agents, warehousemen, bonded carmen and other business which can be conveniently carried on in connection with any of the above.

Rule 46 of the Road Traffic Ordinance 1958 also lays down that 'the holder of a carrier's licence authorizing the use of a motor vehicle for the carriage of goods for hire and reward shall not without reasonable excuse refuse to carry any goods which he may be requested to carry, provided such goods may be carried within the terms and conditions of his licence'.

In the case of the permits granted by the Mines Department to Berjuntai Tin Dredging Bhd, D4 & D5, authorizing the transportation of the tin ores from the mine, the carrier must also conform to the routes stated in the permits. The very fact that the drivers of the lorries cannot choose the routes they should take to the smelters, all the more emphasizes the public nature of the defendant's business and in no way can it be said that it is a private carrier.

Since by its own memorandum of association, the defendant has held itself out as carrying on the business of general carriers to transport goods for hire or reward and that by virtue of the licences carried by its lorries, it cannot refuse to carry any goods which it may be requested to carry, I had considered that the defendant is a common carrier. The fact that the plaintiff is the defendant's main customer does not make the defendant anything less than a common carrier as there was also evidence to show that the defendant had business dealings with other third parties in transporting rubber. The law of agency has no bearing on the facts of this case as the defendant is undoubtedly a carrier of goods for hire or reward.

The defendant has also objected to the sum claimed but unfortunately it had not in the course of the trial even bothered to cross-examine P2 when the latter was adducing evidence as to how the plaintiff had arrived at the figure of $474,740.74 as the loss suffered following the hijacking.

From P1A & C, the loss of the two shipments of tin ore concentrates is calculated as follows. The tin price per kg is given as $30.40. This is the price fixed by the two mines from where the tin ore concentrates were collected pursuant to agreements the plaintiff had with them. Because of the confidentiality of such agreements, the plaintiff did not produce them and the defendant now relies on such omission to maintain that their production would work against the plaintiff. I do not consider that their non-production can tilt this case one way or the other for the very reason that they have nothing to do with the defendant at all. The agreements were strictly entered into between the plaintiff and the mines concerned and if by the very nature of their business, such agreements are confidential, so be it. Suffice for me to say that when fixing the price of the tin ore, the plaintiff did not arrive at some imaginary figure but it was the figure actually agreed upon between the plaintiff and the mines as being the prevailing market price then.

Since the tin ore concentrates contain impurities, such impurities must be separated from the metal itself and the term used for such conversion is called assay. As by P2, the mines concerned undertook the work of determining the gross and nett assay and by multiplying the nett assay with the price of tin, the nett price of tin per kg is determined. Against this, other charges like energy surcharge, monetary charges and government duties and cess were deducted and the value of each shipment is then ascertained by multiplying the nett price of tin per kg with the amount of tin ore concentrates lost. Thus, for the hijacking on 11 March 1981, the total value of tin ore concentrates lost was $16,051.95 and for the hijacking on 13 March 1981, $270,530.53.

After the hijacking, the plaintiff had employed a firm of adjusters, Messrs Thomas Howell (M) Sdn Bhd to investigate the hijacking. For such services the adjusters charged 10% on the nett value of the tin ores lost. As this was an item of necessary expenditure incurred, resulting from the hijacking, I see nothing objectionable to the plaintiff adding the 10% premium they had paid to the adjusters, thereby giving a sum of $177,157.15 as being the actual loss suffered by the plaintiff on the hijacking on 11 March 1981 and $297,583.59 from the hijacking on 13 March 1981.

There was also proof from P1B & D that the plaintiff had paid the two mines for the nett value of the tin ores for the two shipments and since P1 B & D are the bank's statements relating to the instructions for such payments to be made to the two mines, there is therefore no necessity to seek further confirmation from the two mines of such payments. From the evidence, I am fully satisfied that the total sum claimed by the plaintiff is the actual sum it had paid to the two mines plus the 10% premium paid to the adjusters which I consider to be a

refundable item of expenditure as it was an item of loss following the hijacking.

To that end, I had given judgment to the plaintiff for the sum claimed, interest at 8% pa from 13 March 1981 to date of realization and costs.

Order accordingly.

Solicitors: *Azim Ong & Krishnan*; *Ong Chin Beng & Rakan-Rakan.*

Reported by *PS Ranjan*

Public Prosecutor v Wong Moy

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 47 OF 1985
KC VOHRAH J
7 JUNE 1988

Criminal Procedure – Investigations – Unsatisfactory conduct of investigations – Effect on prosecution case

Evidence – Sketch plan – Mistakes in plan – Features from hearsay included – Use of sketch plans in evidence – Onus of proof in criminal law – Rebuttable presumptions – Dangerous Drugs Act 1952, s 37(d) & (da)

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with the offence of trafficking in heroin. The prosecution's case was that she was found, during a police raid at the premises where she rented a room, rushing towards the back portion of the premises and when arrested she had several items in both her hands, including a quantity of heroin. Her defence was that the police had fabricated the prosecution's case against her. According to her, the police had feigned the recovery of certain items from her blouse pocket which one of the police said contained heroin. She also said that the police had recovered from outside the back of the premises a bag which one of them said contained heroin and accused her of being its owner. She also claimed that some other person or persons living in one of the rooms in the house had escaped through the back door of the house when the police raided the house and that the heroin was most probably theirs.

The investigating officer had drawn a sketch plan of the premises which, although sloppily drawn and deficient in several respects, gave a general picture of the layout of the permanent features of the premises. The plan was not drawn to scale. The investigating officer had erased a line drawn to scale. The investigating officer had erased a line of 'x' marks on the plan intended to show the movements of the accused and he said that he had erased them later because he had made a mistake regarding the markings. The investigating officer had gone back to the premises about three months after the raid. Photographs of the premises were taken only four months after the raid. The sketch plan tendered in court had been prepared from an original sketch but the original sketch was not available at the trial. The investigating officer had included features in the plan based on what he had heard from a member of the raiding party who had arrested the accused.

There were various discrepancies in the evidence of the investigating officer and the arresting officer, particularly when considered along with the sketch plan, the photographs, the police report lodged by the investigating officer after the raid, and the evidence tendered by the defence.

Held, acquitting the accused: (1) Features from hearsay should not be shown in a sketch plan. Unfortunately, police witnesses still persist in putting such features in a sketch plan which should only show permanent features visible to them. Courts in admitting such sketch plans as aids to better understanding of the testimony of witnesses allow identification of the additional features unless there are objections from defence counsel.

(2) The investigations in this case were unsatisfactorily conducted. The blemishes in the prosecution's case had become accentuated, and more blemishes had been revealed, in the light of the totality of the evidence. The evidence of certain members of the raiding party with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the investigating officer and the defence left the court in a state of doubt as to what actually took place at the time of the raid.

(3) The cardinal principle enshrined in the law of the country is that the onus of proving the guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a real state of doubt, the prosecution had failed to satisfy the onus of proof which is upon it. The accused had succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs.

(4) In the result the court did not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Act, namely, that she was deemed to have known the nature of the drugs and that she was deemed to have trafficked in the drugs.

Cases referred to
1 *R* v *Lim Kang Chui* [1949] MLJ 211 (folld)
2 *Mat* v *PP* [1963] MLJ 263 (folld)

Legislation referred to
Dangerous Drugs Act 1952 ss 37 & 39

Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor) for the prosecution.
Khairuddin bin Suleiman for the accused.

Cur Adv Vult

KC Vohrah J: In this case the accused was charged as follows:

> That you on 5 October 1984 at about 9.30pm, at house No 71, Jalan Berangan, in the federal territory of Kuala Lumpur, did on your own behalf traffick in dangerous drugs, to wit, 29 plastic packets of heroin and 92 straw tubes of heroin weighing a total of 18.62g, in contravention of the provision of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952, and that you have thereby committed an offence punishable under s 39B(2) of the said Act.

The prosecution's case against the accused is that she was found, during a police raid at No 71, Jalan Berangan, rushing towards the back portion of the premises and when arrested, she had several items in both her hands. In her right hand she held a newspaper package contain-